

(1984) 02 PAT CK 0001
In the Patna High Court
Case No : A.F.A.D. No. 497 of 1976

Yugeshwar Prasad and Others

APPELLANT

Vs

Suraj Narain Prasad

RESPONDENT

Date of Decision : 02-02-1984

Acts Referred:

Bihar and Orissa Land Reforms Act, 1950 — Section 6

Citation : AIR 1984 Patna 270

Hon'ble Judges : Ashwini Kumar Sinha, J

Bench : Single Bench

Advocate : A.C. Ghose, for the Appellant; R.N.P. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Ashwini Kumar Sinha, J.—This second appeal is by the defendants against a judgment of reversal in a suit for partition.

2. The plaintiff claimed 10 annas and 18 gandas share in the properties as detailed at the foot of the plaint.

3. The suit related to Khasra No. 211 appertaining to Khata No. 331, Thana No. 542 in Tauzi No. 7205. It also related to plots Nos. 97, 98 and 99. Plot No. 97 related to khata No. 42 and plots 98 and 99 related to khata No. 46. These two khatas, i. e. khata Nos. 42 and 46, appertained to Thana No. 538 within the same Tauzi. It also related to plot No. 100 appertaining to khata No. 49 in Thana No. 538 within the same Tauzi. The trial Court dismissed the suit. The plaintiff preferred an appeal. The court of appeal below rejected the claim of the plaintiff with regard to plot No. 211 appertaining to khata No. 331. But, with regard to the plaintiff's claim regarding the plots appertaining to khata Nos. 42, 46 and 49, the plaintiff's claim of partition was decreed. It is pertinent to note here that plot No. 100 appertaining to khata No. 49 is a gair mazrua malik land.

4. As against the judgment and decree of the Court of appeal below the plaintiff preferred a second appeal. This second appeal, preferred by the plaintiff, was

numbered as Second Appeal No. 545 of 1976 and this was dismissed, after hearing, at the admission stage itself.

5. The defendants also preferred a second appeal which is the present second appeal. The present second appeal by the defendants, thus, is confined only to plots Nos. 97, 98, 99 and 100 (the different khata numbers are already mentioned above). The learned counsel, appearing on behalf of the defendants-appellants, has advanced only one submission and that is to the effect that the trial Court, while dismissing the plaintiff's suit, amongst other findings, also held that the defendants were recognized by the State of Bihar as raiyat with respect to the suit lands and, according to the learned counsel, the court of appeal below has completely ignored considering the impact of the recognition of the defendants as a raiyat by the State of Bihar. The learned counsel for the defendants-appellants has submitted that the non-consideration of this aspect by the Court of appeal below has vitiated the judgment under appeal.

6. In order to appreciate the submission advanced by the learned counsel for the defendants-appellants it is necessary to state a few facts only so far as they relate to plots Nos. 97, 98, 99 and 100. In brief, the plaintiff's case is that the Thana Nos. 542 and 538 originally belonged to the ancestors of the defendants. Out of 16 annas, 10 annas and 18 gandas of this Tauzi (Tauzi No. 7205) was auction sold and purchased by the ancestors of Chandra-Choor Deo and others who came in joint possession of the Tauzi with the ancestors of the defendants. Thereafter, according to the plaintiff, Chandra-Choor Deo and others (the auction purchasers) sold their 10 annas 18 gandas share in the Tauzi including the Bakasht, Gair Mazrui raiyati lands to the plaintiff by a registered sale deed dt. 29-4-1946 and the plaintiff came in possession of the same. According to the plaintiff, the remaining 5 annas and 2 gandas of the Tauzi remained with the defendants who continued in joint possession with the plaintiff. (The words have been underlined by me for emphasis).

7. The plaintiff's, further, case was that the lands under Khata 42 and 46 were raiyati lands and some of the recorded tenant died issueless and some others abandoned the lands and left the village and the landlord came in possession of those lands appertaining to these khata as their Bakasht. The plaintiff claims joint possession over these lands with the defendants. As the plaintiff felt difficulty in joint possession, he approached the defendants for partition which having not been agreed to, the plaintiff instituted the present suit for partition of his share (as claimed).

8. The defendants 1, and 4 to 7 filed a joint written statement and contested the suit. They admitted that Tauzi No. 7205 originally belonged to their ancestors and 10 annas 18 gandas of the Tauzi was auction sold and purchased by the ancestors of Chandrachoor Deo and others. The defendants denied the purchase of that share by the plaintiff in the year 1946. The main defence was that the lands of khata Nos. 42 and 46 were their self acquisition and the plaintiff had no interest in it. With regard to plot No. 100 appertaining to khata No. 49 the

defence was that it was in their exclusive possession. The defendants also pleaded that they have got their houses and Sehan over the lands of khata Nos. 42, 46 and also on the Gair Mazrui Malik land plot No. 100.

9. The defence with regard to plot No. 211 appertaining to khata No. 331. I am omitting it as this plot No. 211 is not a subject matter of the present second appeal.

10. The defendants also pleaded that after the vesting of the Zamindari, rent of the land in suit was fixed in their name and they were continuously paying rent to the State of Bihar. The defendants, further, pleaded adverse possession over the lands in suit. Upon these pleas, the defendants pleaded that the plaintiff was not entitled to any decree for partition.

11. The trial Court accepted the case of the defendants that they were in possession over the lands of khata Nos. 42 and 46 and also over the Gair Mazrui Malik plot No. 100. The trial Court also accepted the defendants' case that they had their houses over those lands. The trial Court held that the plaintiff had failed to prove the unity of title and possession over the suit land. And, accordingly the trial Court held that the plaintiff was not entitled to the relief claimed. So far as plots Nos. 97, 98, 99 and 100 (the plots number concerned in the present second appeal), the Court of appeal below held that in view of the admission of defendant No. 1 (D. W. 7) to the effect that the acquisition was made in the year 1920 when they were 16 annas landlord of the Tauzi, the lands of these khata merged in the larger interest of the proprietor and if became their Bakasht u/s 22 d) of the Bihar Tenancy Act. It further held that admittedly 10 annas 18 gandas of the Tauzi was auction purchased by the auction purchasers, after the acquisition and hence the auction purchasers of 10 annas 18 gandas of the Tauzi acquired interest over these two khata also.

12. As stated above, the defendants' case was that their residential house stood over a portion of these three plots (plots Nos. 97, 98 and 99) and other plots and according to them a portion of these plots was also included in their sale deed and their latrine stood over these plots and that the plots were within their compound. This assertion of the defendants was denied by the plaintiff and the parties adduced their respective evidences. Defendants also claimed adverse possession over these plots and on this basis their case is that the title of the plaintiff over the same was extinguished. It is well settled that one who pleads adverse possession, the onus to prove the same lies on him. If the lands of khata Nos. 42 and 45 and the Gair Mazrui plot No. 100 were included in the boundary of their houses the Court of appeal below has very correctly observed that the defendants could have taken a commission in proof of their assertion. The Court of appeal below, in my opinion, has applied its judicial mind independently and has correctly held that the defendants' claim of adverse possession with regard to these plots could not be accepted. The Court of appeal below, further, on a very cogent reason held that the defendants' case that the lands were included within the compound of the defendants' houses could not be

accepted.

13. The Court of appeal below also held that the plaintiff and the defendants being co-sharers, the possession of one co-sharer will be deemed to be the possession of the other co-sharer and even if it was conceded that the lands in suit were in possession of the defendants, the defendants being only a co-sharer, the defendants' possession was that of the plaintiff's possession as well.

14. It is well settled that one co-sharer in possession of plots may plead and prove ouster and if so pleaded and proved one co-sharer's possession will not be deemed to be the possession of the other co-sharer. In the instant case, the defendants had not pleaded ouster much less proved it. It is true that an argument was advanced on behalf of the defendants in the Court of appeal below that the words Maukhal-fana and Malkoana were used in the written statement with regard to the nature of defendants' possession over the land in suit and it was argued that these terms meant adverse possession and ouster. The Court below has held that even if the terms Malkoana meant ouster, there was no evidence of ouster in the case at all. The Court of appeal below did not accept the nature of possession which the defendants pleaded, namely, the construction of the house etc. In that view of the matter, the defendants, being only a co-sharer their possession was, in my opinion, very correctly taken as the possession of the plaintiff as well.

15. With these findings the Court below did not accept the defendants' case so far as plots Nos. 97, 98, 99 and 100 are concerned.

16. So far as the only submission (as already mentioned above) advanced by the learned counsel for the defendants-appellants is concerned; in my opinion, there is no force in the submission. The learned counsel appearing on behalf of the respondent has taken me in detail through the judgment of the Court of appeal below. It is not correct for the learned counsel appearing for the defendants-appellants to submit that the Court of appeal below has not considered that aspect. The Court of appeal below in paragraph 24 of the judgment has considered the fact of the payment of rent by the defendants-appellants to the State of Bihar and, very correctly, on sound reasoning, has negated the defendants' plea. I have already held above that the finding of the Court of appeal below to the effect that the plaintiff was also a co-sharer along with the defendants is not erroneous and this was also admitted as already stated above, by the defendant No. 1 himself that 10 annas 18 gandas of the Tauzi was auction purchased by Chandrachoor Deo and others after the acquisition (as claimed by the plaintiff). The Court of appeal below has accepted on a very cogent reason, that the plaintiff's case of purchase from the auction purchaser was correct i. e., purchase of 10 annas and 18 gandas in the Tauzi. This being the position, both the plaintiff and the defendants were the co-sharer in the Tauzi concerned. The argument of the learned counsel appearing on behalf of the defendants-appellants is that the Court of appeal below has not considered one aspect which was considered by the trial Court that is the finding of the trial Court to the effect

that the defendants were recognized as raiyats by the State of Bihar. The learned counsel appearing on behalf of the defendants-appellants also draw my attention to the rent receipts (Exhibits A to A3 granted by the State of Bihar) and it is on this that the learned counsel appearing for the defendants-appellant has tried to persuade me to accept that in view of the fact that the defendants were recognized as raiyats by the State of Bihar, the plaintiff has no case and must be non-suited. I have already stated above that there is no force in the submission advanced by the learned counsel for the defendants-appellants. When the rent was fixed by the State of Bihar in favour of the defendants-appellants the plaintiff had no notice of the same. The Court of appeal below has held that there was nothing on the record to show that the plaintiff had notice of the fixation of rent over these lands. In such a situation in my opinion, the payment of rent by the defendants to the State of Bihar cannot extinguish the title of the plaintiff. The learned counsel appearing on behalf of the defendants-appellants has not brought to my notice nor has argued that this finding of the Court of appeal below (as just mentioned above) was erroneous or not based on the material on record. Thus, the plaintiff being a co-sharer in the Tauzi in question, even if the defendants-appellants were in possession, the possession of the defendants-appellants must be deemed to be the possession of the plaintiff as well and, therefore, neither the plaintiff's title was extinguished nor he can be said to be out of possession.

17. The learned counsel appearing on behalf of the defendants-appellants has relied upon Section 6 of the Bihar Land Reforms Act which reads as follows:

"6. Certain other lands in khas possession of intermediaries to be retained by them on payment of rent as having occupancy rights.

(1) On and from the date of vesting all lands used for agricultural or horticultural purposes", which were in khas possession of an intermediary on the date of such vesting, including:--

(a) (i) proprietors' private lands let out under a lease for a term of years or under a lease from year to year, referred to in Section 116 of the Bihar Tenancy Act, 1885 (8 of 1885),

(ii) landlords' privileged lands let out under a registered lease for a term exceeding one year or under a lease, written or oral, for a period of one year or less, referred to in Section 43 of the Chota Nagpur Tenancy Act, 1908 (Ben. Act 6 of 1908).

(b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lessee of an estate or tenure and cultivated by himself with his own stock or by his own servants or by hired labour or with hired stock and

(c) lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is

entitled to recover khas, possession thereof;

shall, subject to the provisions of Sections 7A and 7B be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner :

Prantu Is Up-dhara men anterwist kisi baat se kisi madhyawarti ko kisi naukarana bhumi per athwa adhikar-abhilekh (khalian) men chaukidari-chakran ya goraitt jagir athwa mafi-goraiti ke roop men abilikhit kisi bhumi per ya kisi anya aisi bhumi per, jiska abhibhog adhikar, nihit hone ki tarikh ke pahle hi, raiyat ko prodbhut ho chuka ho, kabja banaye rakhne ka haq na hoga. aspastikaran:-- Is up-dhara ke paryojnarth naukrana bhumi se abhipret hai anudan ke roop men dharit aisi bhumi jo lagan ke badle sewa se bharit ho athwa aisi bhumi jo kewal ki jane wali sewaon ki mazdoori ke badle dharit ho.

(2) If the claim of an intermediary as to his khas possession over the lands referred to in Sub-section (1) or as to the extent of such lands is disputed by any person prior to the determination of rent of such lands under the said subsection the Collector shall, on application, make such inquiry into the matter as he deems fit and pass such order as may appear to him to be just and proper :

Provided that the Collector in making such inquiry shall give due weight to the circumstances under which the area in which such lands were situated was declared to be a disturbed area under the Police Act, 1861 (8 of 1861), after the first day of November, 1946." It is well settled that the word "intermediary" in Section 6 of the Bihar Land Reforms Act has been used though in singular number but it (obviously includes plural and it is also apparent from Section 15 (2) of the Bihar and Orissa General Clauses Act. It follows that if there are more intermediaries than one and all of them are in joint possession, the lands in their khas possession can be retained by the entire body of intermediaries as raiyats with occupancy right. Reference may be made to the case of Ramrudhar Singh Vs. Dileshwar Singh and Others, .

18. On a perusal of the judgment of the Court of appeal below I am satisfied that the lower appellate Court has applied its judicial mind independently and has very properly appraised the evidences on record. In my opinion the findings arrived at by the Court of appeal below cannot be said to be unreasonable or perverse.

19. In the result, the appeal fails, But, in the circumstances of the case there shall be no order as to costs.